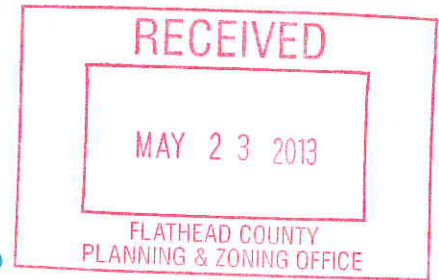


Flathead County
Planning & Zoning
1035 1st Ave W, Kalispell, MT 59901
Telephone 406.751.8200 Fax 406.751.8210



APPLICATION FOR A VARIANCE

Submit this application, all required information, and appropriate fee (see current fee schedule) to the Planning & Zoning office at the address listed above.

FEE ATTACHED \$ 350.00

Before completing this application please read instructions on page 4.

1. **OWNER:**

Name: Fred Mc Knight
Address: P.O. Box 1154 Phone: 602.577.3054
City/State/Zip: Lakeside, MT 59922
Email: _____

INTEREST IN PROPERTY: owner fee simple

2. **APPLICANT:** *(If different from above)*

Name: same as above
Address: _____ Phone: _____
City/State/Zip: _____

3. **TECHNICAL/PROFESSIONAL ASSISTANCE:** *(If applicable)*

Name: Richard DeJana, Esq.
Address: P.O. Box 1757 Phone: 406.752.4120
City/State/Zip: Kalispell, MT 59903-1757
Email: rdejana@montanasky.net

4. **LOCATION OF PROPERTY FOR WHICH VARIANCE IS SOUGHT:**

Physical Address: 357 Caroline Point Road, Lakeside, Montana 59922

5. **ZONING DISTRICT:** Caroline Point **ZONING DESIGNATION:** R-2

6. **DATE PROPERTY ACQUIRED:** 9/9/97

7. **LEGAL DESCRIPTION:**

Subdivision *(if applicable)* Whipps'Point Caroline Villa S Lot/Tract(s) portions of Lots 6-a and 6-

Assessor # 0000540550 Section 6 Township 26 North Range 20 West

Parcel A, COS 18617 (copy attached)

8. **REQUEST FOR A VARIANCE FROM THE PROVISIONS OF** *(State Section, Part, and Paragraph of the Zoning Regulations):* See attached

9. **THIS IS A REQUEST FOR A VARIANCE IN RELATION TO THE PROVISIONS OF THE REGULATIONS** *(check one below):*

Area x (non conf. Structure) Yard x (Set Back) Height _____
Coverage _____ Parking _____ Other _____

10. **STATE SPECIFICALLY THE CHANGE(S) PROPOSED AND THE REASON(S) SUCH CHANGE(S) ARE NECESSARY** *(use additional sheet if necessary):*

see Attached

11. **EXPLAIN HOW YOUR CASE CONFORMS TO EACH OF THE FOLLOWING REQUIREMENTS** *(be complete, use additional sheet if necessary):*

A. Strict compliance with the provisions of these regulations will limit the reasonable use of the property, and deprive the applicant of rights enjoyed by other properties similarly situated in the same district.

see Attached

B. The hardship is the result of lot size, shape, topography, or other circumstance over which the applicant has no control.

see Attached

C. The hardship is peculiar to the property.

See Attached

D. The hardship was not created by the applicant.

See Attached

E. The hardship is not economic (*where a reasonable or viable alternative exists*).

See Attached

F. Granting the variance will not adversely affect the neighboring properties or the public.

See Attached

G. The variance requested is the minimum variance, which will alleviate the hardship.

See Attached

H. Granting the variance will not confer a special privilege that is denied other similar properties in the same district.

See Attached

12. **ATTACH A PLOT PLAN OR DRAWING.**

I hereby certify under penalty of perjury and the laws of the State of Montana that the information submitted herein, on all other submitted forms, documents, plans or any other information submitted as part of this application, to be true, complete, and accurate to the best of my knowledge. Should any information or representation submitted in connection with this application be incorrect or untrue, I understand that any approval based thereon may be rescinded or other appropriate action taken. The signing of this application signifies approval for FCPZ staff to be present on the property for routine monitoring and inspection during the approval and development process.


Owner/Applicant Signature

5/10/13
Date

INSTRUCTIONS FOR VARIANCE APPLICATION

1. ANSWER ALL QUESTIONS. Answers should be clear and contain all the necessary information.
2. In answering Question 7, refer to the classification system in the Zoning Regulations and explain in detail the specific standards from which the applicant is seeking relief.
3. In answering Question 9, be specific and complete. In this and all other questions, if additional space is needed you may use additional paper, and list which section number you are continuing.
4. Answer Question 10, A-H completely and fully.
5. A copy of the plot plan or site plan must be submitted with each application (*Please include 6 copies if you submit a size larger than 11x17*).
6. A **Certified** Adjoining Property Owners List must be submitted with the application (*see forms below*). The list will be sent directly to the Planning & Zoning office, unless you request otherwise. This list is valid for a period of 6 months from date generated. You may also get a certified adjoining landowners list from a title company if you choose.
7. A fee per the FCPZ schedule of fees for a variance application must be submitted with this application to cover the cost of necessary investigation, publication, mailing and processing procedures.

Attachment to Mc Knight Variance Application

The following contains the responses to items 8 and 11 of the variance application. Following those responses is additional information which should be considered in reviewing this application. The additional material includes location information, photographs since the deck has already been partially built, and information on the nature of the property

Before responding to questions, the Applicant notes this is an application being made after a portion of construction on his home has been completed. One portion, that being a deck on the west side of the property which crossed the property's boundary has been removed. A portion of the deck went into the lakeshore protection area. That has been removed. The portion facing the lake which the planning director has determined to need a 20 set back, has not been removed and is the topic of this request. That portion was about to be removed, but should this variance be granted, the cost would be tripled to put the portion back on. Should this request be denied, the entire deck may have to come down as not being serviceable.

The applicant withdrew a prior application on advise of his current counsel, because it was felt the application requested items which could not be granted and neglected to request essential variance items.

Responses to application questions:

8. REQUEST FOR A VARIANCE FROM THE PROVISIONS OF *(State Section, Part, and Paragraph of the Zoning Regulations)*:

Flathead County Zoning Regulations 2 .0 7.040 (3), Changes Permitted to Non-Conforming Uses and 3.10 .040 (3) (A.), Setbacks, Minimum Yard Requirements for Principal Structure.

2.07.01 allows the continuation of non-conforming uses, but only to the extent that the present non-conforming setback can continue. The Applicant is now seeking approval to expand the setback non-conformity. The deck along the North side of the house is approximately 11 feet wide by 37 ½ feet long. The roof will extend over the same. Under the regulations as they are written, that portion of the deck and roof over the same within either 10 or 20 feet of the west boundary of the property, require a variance. As discussed later in this application, there may be some question whether this is a front or side yard but for all practical purposes a variance is still needed and whether it be for 10 feet or 20 feet is of little significance in relationship to the property. The planning director has determined this has a 20 foot set back. Either answer would be correct and we have no quarrel with the determination.

The addition adds 412.5 ft.² which coupled with the existing 1767 ft.² (assessed 1072 ft.² plus the recent addition), creates a structure which is 2179.5 ft.². The property is .39 acres (COS 18617, attached) which is 16,988 ft.² Even with the two other existing buildings, lot coverage is not an issue.

10. STATE SPECIFICALLY THE CHANGE(S) PROPOSED AND THE REASON(S) SUCH CHANGE(S) ARE NECESSARY:

The Applicant is requesting approval by way of a variance to retain a deck and the roof over the deck along the North side of his house. Recognizing that is not as wide on the end close to the lake and on the other end. The deck and roof are approximately 11 feet wide and approximately cover 37 ½ feet in a linear direction. These additions extend from the northwest corner of the principal structure to the northeast corner of the principal structure. This is considered part of the principal structure under section 7.1 8.200 Flathead County Zoning Regulations, and must comply with setback requirements of the R-2 zoning unless a variance is granted or other relief is provided as discussed below.

11. EXPLAIN HOW YOUR CASE CONFORMS TO EACH OF THE FOLLOWING REQUIREMENTS :

A. Strict compliance with the provisions of these regulations will limit the reasonable use of the property, and deprive the applicant of rights enjoyed by other properties similarly situated in the same district.

Prior to discussing the topic as stated, it is important to recognize this is not the statutory question. Statutes look not so much to other property similarly situated, but rather the zoning regulation itself as adopted by the resolution creating the district. The law states:

76-2-223. Powers of board of adjustment. (1) The board of adjustment shall have the following powers:

(c) to authorize upon appeal in specific cases such variance from the terms of the resolution as will not be contrary to the public interest and where, owing to special conditions, a literal enforcement of the provisions of the resolution will result in unnecessary hardship and so that the spirit of the resolution shall be observed and substantial justice done.

The applicant owns four adjacent properties, Lots 6A-TR1, 6A-TR2, 6B-TR1 and 6B-TR2 of Whipps Point Caroline Villa Sites Subdivision. Staff contacted the Flathead County Plat Room and determined that the four parcels do not have separate legal descriptions and they must be conveyed together. This means that the tracts cannot be sold individually. According to the Flathead County Zoning Regulations (FCZR), "*where two or more lots are used as a building site and where main buildings cross lot lines, then the entire area shall be considered as one lot....*" [Section 5.08.010(1) FCZR] Certificate of Survey #18617 shows the property as one tract, and does not separate out the four parcels individually since they must be conveyed together.

When one examines the regulations, one realizes that the minimum lot size for which the setbacks were specified were 20,000 ft.². That is over 3000 ft.² larger than the Applicant's lot when the lot is measured in its full dimensions (to low water) rather than just to the high water mark. No construction can occur below the high water mark making the functional lot much smaller.

When the property was viewed for tax assessments (see attached copy of assessment record), it was assessed by frontage and depth. The property was found to be 67 feet wide and 104 feet deep. This yields only 6968 ft.². That is a significantly smaller parcel of land than was contemplated under R-2 zoning.

There are other parcels which are also smaller than the minimal requirement for the zoning, as the attached plat indicates even if the entire ownership is considered including the portion under water, this is one of the smaller lots within the subdivision. This is a case of zoning being imposed over existing properties none of which comply with the zoning district regulations.

The property cannot comply with the existing regulations and is smaller than other properties similarly situated within the district. Recognizing this is lakeshore property, the denial of the variance will severely limit the use as compared to neighbors and others in similar zoning districts.

B. The hardship is the result of lot size, shape, topography, or other circumstance over which the applicant has no control.

As noted in the previous sections, although the lot as described appears large enough to be a functional R-2 lake lot the physical lot itself not even considering the 20 foot lakeshore setback, is less than a 1/3 of what the setback regulations were created for (minimum 20,000 ft.².) This resulted from imposing zoning in a manner inconsistent with the actual properties found in the zone. When this occurs, and particularly on small lots, a hardship results from the lot size and shape.

The situation is aggravated by this being family land. It has been in the Mc Knight family since 1970 (See: attached deeds). The family ownership well precedes the zoning and the set back requirements. The home was built next to the property line. This is common in the neighborhood. Mr. Mc Knights's neighbor to the south has built over the line onto Mr. Mc Knight's property. (See: COS Corr 17382 attached). What is unique is that the potion of the house where this deck is

asked to be allowed sits against a park on the west side. (Please see attached review as to the attempted abandonment of the road. The 30 foot wide portion is park, while the 20 foot wide portion is right of way.) The normal concerns with set backs — clear view and fire danger do not justify exercising the police power here.

C. The hardship is peculiar to the property.

The description of the property above shows how this is a peculiar situation. It is made even more peculiar because as residential property it is not afforded the same “grand fathered” set back as provided to industrial property in an **I-1H LIGHT INDUSTRIAL zone**. There, a nonconforming building set back received a significantly different treatment than in this residential zone.

3.28.040 Bulk and Dimensional Requirements (I-1H)... .

4. Exemption to Setbacks:

Specific exemptions for structures (excluding signs) and uses in place at the time of adoption of these regulations:

A. Where a lot is previously developed and a primary building encroaches into the setback, the existing building line of the primary building shall be used as the setback line for future development.

This difference raises equal protection issues. Normally the distinction in the zoning would justify the difference in treatment. But here, just as with the I-1H zoning, there are no adjacent buildings or roadways. None of the normal set back justifications exist. The forgoing shows a 20 foot set back from a park is with no substantial justification for residential property like the petitioner’s when it is not applied to industrial property. This is unique to the property.

In response to the earlier application, the staff indicated that the lots within the subdivision were between .1 and .8 of an acre. Since this lot was approximately .3 or .4, it was not peculiarly a small lot. In a review of the neighboring lots, counsel for the applicant could not find a lot actually smaller unless, as here one considers only one of several joined assessor tracts which cannot be separated. Considering not only the recorded acreage, but also the physical acreage, it is clear this is a particularly small lot with little usable space.

D. The hardship was not created by the applicant.

One could argue that raising a house from 1072 ft.² of usable property (see assessment) to the current size (1762 ft.²) could constitute the creation of a hardship by the applicant. That's what the staff said in response to the prior application. But the size of the facility, existing when the zoning was adopted, is certainly inappropriately small for a lake residence. The ability to expand in a usable direction and to have a deck facing the lake which should be of adequate size is a reasonable expectation for this type of property. The present condition of the property and the condition prior to it being enlarged is a hardship not created by the applicant but rather imposing an inappropriate zoning of the property.

E. The hardship is not economic (*where a reasonable or viable alternative exists*).

When attempting to work with lake property, it is difficult to say that the hardship by limiting the structure not only by the zoning but by the imposed conditions of the structure and its pre-zoning locations is not economic. Creating a structure similar to that enjoyed by other lake properties has an economic impact.

But the real issue is the quiet enjoyment of the property and how it should be enjoyed. Obviously the initial remodeling was needed to correspond to the way the house was internally built. It simply lengthened the rooms. So now, would it be appropriate to require that a deck could not sit facing the lake because it is within 10 feet or 20 feet of a park for which there is no need of a setback. It seems abundantly clear this hardship existed at the time of the remodel and continues to exist.

The fact that the applicant commenced work prior to applying for this variance is not to be considered by the Board. That is not an economic consideration before you. Before you are the questions which should have been addressed to you prior to constructing the current deck.

F. Granting the variance will not adversely affect the neighboring properties or the public.

One cannot see how an extension of the setback will interfere with the public's use, which is seldom used, of a park to which the public has not tried to create usable access. As to the others in the neighborhood, those most affected are in support. We know of only one that may be in opposition and he is the one whose building encroaches on the east side of the lot.

G. The variance requested is the minimum variance, which will alleviate the hardship.

Staff may suggest not having a deck or having a deck on the southern 10 feet of the house or having a deck on one of the sides not facing the lake might be an alternative. It does not sound like an alternative for lake property. One could argue you could make a deck smaller so it could be used. Is that a deck for lake property? To allow this property to function as a normal lake property despite its small size over which a much larger minimal zoning was imposed, is truly a minimal variance.

H. Granting the variance will not confer a special privilege that is denied other similar properties in the same district.

All that is being asked is that one who owns the property be allowed to have a functional property similar to that which is enjoyed by his neighbors. Nothing more is asked. This is no special privilege. This is returning the use of property to that which should have been allowed were not for the imposition of an inappropriate zoning district.